

STATE OF MICHIGAN
COURT OF APPEALS

GREEN TREE SERVICING, LLC, f/k/a B.A.C.
HOME LOANS SERVICING, L.P. and
COUNTRYWIDE HOME LOAN SERVICING,
L.P.,

Plaintiff-Appellant,

v

JAMES K. RAU and DONNA J. RAU,

Defendants-Appellees.

UNPUBLISHED
August 19, 2014

No. 316077
Cass Circuit Court
LC No. 12-000342-CH

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this suit for an equitable mortgage plaintiff, Green Tree Servicing, LLC, as the successor in interest to Bank of America, NA, appeals by right the trial court's order granting defendants', James K. Rau and Donna J. Rau, motion to dismiss. Because we conclude there were no errors warranting relief, we affirm.

In 2003, James and Donna Rau, who were married, sought financing to purchase real property in Marcellus, Michigan. On the recommendation of a mortgage broker, Donna Rau alone applied for the loan. On the application, Donna Rau indicated that she intended to be the sole property owner. The lender approved the loan and proceeded to arrange the closing.

Because Donna Rau could not be present at the closing, she granted James Rau a limited power of attorney to purchase and mortgage the property on her behalf. On September 30, 2003, James Rau executed the promissory note, which was secured by a mortgage on the property, on Donna Rau's behalf. The mortgage was granted to Mortgage Electronic Registration Systems (MERS) with Donna Rau as the sole mortgagor. However, the title company drafted the warranty deed to convey title to "Donna J. Rau and James K. Rau, husband and wife." Sometime thereafter, MERS assigned Donna Rau's note and mortgage to Bank of America on behalf of the original lender and Donna Rau eventually defaulted on the note.

In April 2012, Bank of America sued James and Donna Rau. In its complaint, Bank of America requested, in relevant part, that the trial court establish an equitable mortgage on the property. Bank of America alleged that an equitable mortgage was proper because the original loan disbursed funds for the benefit of both James and Donna Rau and because James consented to the mortgage by executing it on his wife's behalf.

The trial court held a bench trial in March 2013. After Bank of America presented its proofs, James and Donna Rau moved for dismissal under MCR 2.504(B)(2). The trial court determined that Bank of America had not established the right to an equitable mortgage to "save" it from mistakes that could have been prevented. It, therefore, dismissed the equitable mortgage claim.

Bank of America then appealed in this Court. After Bank of America appealed, Green Tree acquired the note and mortgage at issue. Green Tree then moved for substitution as the plaintiff-appellant and this Court granted the motion. See *Bank of America, NA v James K Rau*, unpublished order of the Court of Appeals, entered August 7, 2014 (Docket No. 316077).

Green Tree argues on appeal that the trial court erred when it dismissed its claim for the imposition of an equitable mortgage. This Court reviews de novo a trial court's decision on a motion for involuntary dismissal, but reviews the factual findings underlying the court's decision for clear error. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). This Court similarly reviews de novo a trial court's application of equity to the facts after a bench trial. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

"A court of equity may impose and foreclose an equitable mortgage on a parcel of real property when no valid mortgage exists but some sort of lien is required by the facts and circumstances of the parties' relationship." *Eastbrook Homes, Inc v Treasury Dept*, 296 Mich App 336, 352; 820 NW2d 242 (2012). Because the title company drafted the deed to convey the property to James and Donna as husband and wife, they held the property as tenants by the entirety; and, accordingly, Donna Rau could not by herself mortgage the property. *Canjar v Cole*, 283 Mich App 723, 730-731; 770 NW2d 449 (2009). For that reason, the mortgage was invalid.

Here, the record evidence suggests that Donna Rau had agreed with the original lender to purchase the property by herself.¹ The evidence further supports a finding that the parties intended the note, mortgage, and deed each to be in Donna Rau's name alone. It appears then that the drafter of the deed made a mistake when it included language conveying the property to James and Donna Rau as a married couple; this does not, however, support an inference that the

¹ James Rau testified that he intended to buy the property with his wife, which, he opined, is why he appears on the deed. But he also testified that, because of his credit, the broker that they went to advised him to not be a part of the transaction; he also agreed that the broker told him that Donna Rau should be the one to make the "application, and do the mortgage, and do the note and everything."

mortgage erroneously excluded James Rau as a mortgagor. Green Tree's predecessor in interest was also in a position to discover and rectify the mistake at the closing by having James Rau execute a mortgage or by correcting the deed before proceeding. Green Tree and Bank of America could also have protected their own interest by noting the discrepancy and seeking correction before purchasing the note and mortgage. Green Tree or its predecessors might also have sued to reform the deed to reflect the actual intent of the parties. See *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371-373, 379-381; 761 NW2d 353 (2008). Given these facts and the equities at issue, we cannot conclude that the trial court erred when it determined that Green Tree's predecessor was not entitled to an equitable mortgage. See *Townsend v Chase Manhattan Mtg Corp*, 254 Mich App 133, 139-140; 657 NW2d 741 (2002). Because the mistakes that necessitated the request for equitable relief could have been avoided with reasonable diligence, Green Tree is not entitled to equitable relief. *Powers v Indiana & Michigan Electric Co*, 252 Mich 585, 588; 233 NW 424 (1930). The trial court did not err when it dismissed this claim. MCR 2.504(B)(2).

On appeal, Green Tree—as the successor to Bank of America's appeal—raises several arguments in favor of creating an equitable mortgage that Bank of America did not raise before the trial court. It argues that the trial court should have granted equitable relief because Donna Rau was simply acting as her husband's agent in procuring the property and the parties intended to include James Rau on the mortgage. In ordinary civil cases, although this Court has the discretion to review unpreserved issues, it is under no obligation to do so. See *Bailey v Schaff (On Remand)*, 304 Mich App 324, 344-346, 345 n 3; ___ NW2d ___ (2014). And, under the facts of this case, we decline to consider these unpreserved arguments. Finally, we further decline to address as moot whether the trial court erred when it determined that Green Tree's predecessor had an adequate legal remedy under the facts of this case. *Attorney Gen v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Joel P. Hoekstra